IN THE

Supreme Court of the United States

October Term, 1945—No.

In the Matter of

CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,878.

THE 415 FIFTH AVENUE COMPANY, INC., *Petitioner,*

against

JOHN F. X. FINN, as Trustee of Childs Company, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts and the questions presented are set forth in the petition. The questions will be discussed in the order in which they are stated in the petition.

POINT I.

The Circuit Court of Appeals erred in holding that the power of the District Court to enforce its order of September 27, 1944, as amended, was subject to the restraints imposed by the Rent Control Law.

Acting under its constitutional power to establish a uniform system of bankruptcy, Congress by Chapter X of the Bankruptcy Act conferred upon the District Court exclu-

sive jurisdiction of the Debtor and its property, wherever located. The District Court, in the proper exercise of such jurisdiction over property of the Debtor consisting of the leasehold, solemnly adjudged that the lease had expired and petitioner was entitled to possession. Unless and until reversed on appeal, such judgment conclusively established petitioner's right and respondent's duties.

Private rights which have been vested by the judgment of a court having jurisdiction of the subject matter and the parties cannot be taken away by subsequent legislation but must be enforced by the court regardless of such legislation. It is not within the power of a legislature to take away rights which have been once vested by a judgment.

Hodges v. *Snyder,* 261 U. S. 600, 603.
McCullough v. *Virginia,* 172 U. S. 102, 123.

Petitioner's right to the restoration of its property became vested and final on September 27, 1944. The lower courts have held in effect, that this right was not violated by the Rent Control Law because the law did not destroy the right but merely postponed enforcement, during the existence of an emergency, until July 1, 1946. When this date arrives, legislation now pending will undoubtedly have extended the emergency until July 1, 1947. Experience teaches that the legislation will be renewed indefinitely, year after year; and so, year after year, respondent and his successors in interest will seek, and the District Court will be obliged to grant, order after order prolonging the occupant's possession and depriving petitioner of the benefits of the judgment in his favor. To describe this as a mere postponement of remedy, rather than nullification of the District Court's judgment, seems altogether illusory.

If, in this case, later State legislation can constitutionally override the valid judgment of a Federal Court, ex-

ercising its jurisdiction in the administration of an insolvent debtor's estate, there would seem to be no reason why similar "emergency" measures could not invalidate any valid final decision or decree of a Federal Court or official body in the proper exercise of its powers.

Whether or not a State possesses any such veto power is a question of far reaching importance in relation particularly to bankruptcy administration and generally to those situations in which problems arise concerning the controlling effect of Federal or State law. It is respectfully urged that this question is one which has not, and should be, decided by this Court.

POINT II.

Respondent was not a "tenant" entitled to invoke the protection of the Rent Control Law.

The question here presented relates primarily to the effect, upon respondent's status, of the District Court stays which enabled him to continue in possession pending appellate proceedings. This involves the determination of the rights and obligations of litigants under decrees and orders of a Federal Court. Only incidentally involved is the meaning and effect of the Section 2 (e) of the Rent Control Law defining a tenant as follows:

> "A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any business space" (*supra*, p. 5).

The restrictions against eviction, contained in Section 8 (*supra*, p. 5), apply only to a tenant. Was respondent a "tenant" on March 28, 1945, when the law took effect *

and respondent was in possession pursuant to the order of March 16, 1945 (R. 14) which in effect stayed his eviction until June 8, 1945, *i. e.*, until the eighteenth day after this Court's decision, on May 21, 1945, affirming the order affecting 1553 Broadway? Was he a "tenant" at any time during the various stay periods?

The order of September 27, 1944 (R. 7) adjudging that the lease had terminated and awarding possession to petitioner, precludes any claim that thereafter respondent was a lessee, sublessee or licensee. Was he, then, for the duration of the stays, a "person entitled to possession or to the use and occupancy" of the premises?

The purpose of the stays was to maintain the status quo pending appeal. When this Court denied certiorari, the effect of its order was retroactive and restored petitioner to the rights and remedies it would have enjoyed, had there been no appeals and no stays. Likewise as to respondent's duty to surrender possession. Performance of the duty, but not the duty itself, had been held in abeyance as a matter of judicial grace.

To be "entitled to possession" the possessor must show some *legal right* to possession. "Entitled to possession" and "having a legal right to possession" are synonymous terms. The District Court's judgment confirmed petitioner's and denied respondent's right to possession. Stay

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* The opinion of the Circuit Court of Appeals (R. 45) states that the law was effective retroactively as of January 24, 1945. This is an error. Chapter 314 of the Laws of 1945, relating to "business space", became a law March 28, 1945, with the approval of the Governor, and contained no provision as to retroactive effect. Chapter 3 of the Laws of 1945 became a law January 24, 1945. This controlled rents and evictions as to "Commercial Space" and was not applicable to petitioner's premises, which constitute "business space" as defined by Chapter 314. By Chapter 315, which became a law on March 28, 1945, Chapter 3 was amended in various respects, retroactively as of January 24, 1945.

of *enforcement* of petitioner's right did not take away the right or confer it on respondent. The stay merely permitted *temporary violation* of petitioner's right.

The lower courts (R. 33, 45), in holding that respondent was a tenant, placed much emphasis on *Cohen* v. *Starke,* 269 App. Div. 256, a New York decision which construed Section 2 (i) of Chapter 3 of the Laws of 1945, in effect January 24, 1945, which defined a tenant as "A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any commercial space." That statute, like the one here involved, forbade the eviction of a tenant willing to pay an "emergency rent." The landlord, pursuant to one of its provisions, had cancelled the lease and commenced summary proceedings to recover possession, in which proceedings the tenant interposed an answer. At the trial, on January 15, 1945 a stipulation was made by which the tenant withdrew his answer and consented to the entry of a final order in favor of the landlord and the issuance of a warrant forthwith. A warrant was issued, but, in accordance with the agreement, execution was stayed until January 31. The tenant thereupon paid and the landlord accepted the rent for the month of January.

The tenant remained in possession after January 31 and the landlord demanded that the Marshal execute the warrant. The Marshal refused on the ground that execution had been stayed by the enactment of the statute on January 24. In a further proceeding to compel the Marshal to execute the warrant, one of the questions litigated was whether the occupant was a tenant within the meaning of the act on January 24. Obviously he was and the Court properly so held. Although his lease had expired, he had made and the landlord had accepted payment for use and occupancy of the space until January 31, the date to which,

with the landlord's consent, execution had been stayed. On January 24, therefore, he was clearly "entitled to the possession" of his space.

The present case differs from *Cohen* v. *Starke* in two vital particulars. First, there has been no payment of rent by respondent or acceptance thereof by petitioner since the lease was terminated on June 23, 1944. Petitioner's refusal of tendered payments (R. 19; see also *The 415 Fifth Ave. Co. Inc.* v. *Finn*, 146 F. (2d) 592, 593) was based on the fear that acceptance might support a claim by respondent that his possession was rightful. Second—petitioner has not consented to any stay. Each order postponing the time of surrender was granted over petitioner's opposition (R. 9, 11, 12, 14).

It is respectfully urged that petitioner and not respondent is the person who has been "entitled to possession" of the premises ever since October 27, 1944, when respondent was commanded to vacate by the order of September 27, 1944; that during this period respondent has been a trespasser, in the legal sense, profiting by his own wrong by retention of possession; and that the orders suspending petitioner's remedy for preventing the trespass did not create any right to continue the trespass.

A Federal question as to the interpretation and effect of the stay orders is presented, which merits review by this Court.

POINT III.

The Rent Control Law, as applied to the order awarding possession to petitioner, affects procedure and not substantive rights, and was not binding on the District Court.

It is elementary that a state statute cannot affect proceedings in federal courts sitting in equity and the jurisdiction of such a court cannot be enlarged or narrowed by a procedural state statute.

> *Tower Hill-Connellsville Coke Co.* v. *Piedmont Coal Co.*, 64 F. (2d) 817, 828.

In HOLLAND on *Jurisprudence*, 13 Ed., page 90, the author says that law "defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law' or Procedure."

Difficulty is frequently encountered in determining whether a given set of facts gives rise to a substantive right or presents merely a question of procedure. That is not true of the present case. As to the substantive rights of the parties, they were definitely determined by the order of September 27, 1944. The lease and all rights based thereon ceased. The owner's rights and those of the tenant were finally adjudicated. All that remained to be done was procedural—the enforcement of the substantive rights already determined. This could be done by the issuance of a warrant or other process for the physical removal of respondent's property from the premises, or possibly by punishing respondent for contempt for failure to obey the judg-

ment. Whatever form the proceeding took, it would be purely a method of procedure as defined by this Court in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14, as follows:

> "The judicial process for enforcing rights and duties recognized by substantive law for justly administering remedy and redress for disregard or infraction of them."

The remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting.

> *Chicago Auditorium* v. *Cramer*, 8 Fed. (2d) 998, 1004.

The purported effect of Section 8 of the Rent Control Law providing that a tenant shall not be evicted, was to enjoin the District Court from enforcing its judgment. Whether the law merely affected procedure or created or regulated substantive rights is a question of general importance in relation to the jurisdiction of Federal Courts and ought to be settled by this Court.

POINT IV.

Section 8 (e) of the Rent Control Law discriminates against owners of real estate occupied by bankruptcy trustees, in violation of the Fourteenth Amendment.

In substance, said section provides that a holdover tenant may be evicted if he refuses, on demand of the landlord, to renew his lease for the same term or, at the land-

lord's election, for a shorter term. Without such a provision, the tenant would be free at his option to continue possession during the emergency period at the statutory rent or terminate the tenancy at his pleasure. The landlord would be bound but the tenant would not. To protect the landlord against this inequity, the statute withholds its benefits from a tenant who refuses to assume the burdens of a renewal lease. But this presupposes a tenant who is free to contract. Such freedom is not present in the case of trustee of a bankrupt tenant. The trustee could not renew, for a long term or short term, without court approval after hearing. A demand upon him would be a futile gesture. The statute therefore does not, and could not, give to the landlords of bankrupt tenants the protection which is available to other landlords who are similarly situated except that their property is not in the custody of a Court of Bankruptcy. The latter class of landlords is thereby denied the equal protection of the law.

POINT V.

The writ of certiorari should be granted.

Respectfully submitted,

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